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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ENQUIRER, INC.,
Appellant,

v.

CAROL BURNETT,
Appellee.

On Appeal from the Califorinia Court of Appeal, Second Appellate District

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STATEMENT AS TO JURISDICTION

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments permit a state, arbitrarily and based solely on content, to impose on one publisher of a weekly tabloid a harsher standard for libel liability and damages than that applied to other weekly and monthly publications?

2. Do the First, Fifth, Eighth and Fourteenth Amendments permit a public figure to obtain punitive damages in a civil proceeding for libel based simply on showing of "conscious disregard for the rights of others" by a preponderance of the evidence, when:

—There was no proof, and no claim, that the publisher acted out of hatred or ill will;

—There was admittedly no measurable damage to reputation;

—The article complained of was promptly retracted; and

—Punishment was held justified because of the court's stated distaste for the defendant's "style of journalism"?

Pursuant to Rule 28.1, Appellant states that it is a Florida corporation wholly owned by GP Group, Inc., a Delaware corporation that also owns Distribution Services, Inc., a Delaware corporation, and Weekly World News, Inc., a Florida corporation. Appellant has no other affiliates or subsidiaries except wholly owned subsidiaries.

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STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the California Court of Appeal, Second Appellate District, entered in this case on July 18, 1983, as modified August 1, 1983, holding that California Civil Code §§ 48a and 3294, as applied to Appellant in this case, do not violate the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal is reported officially at 144 Cal. App. 3d 991 and unofficially at 193 Cal. Rptr. 206. It is reproduced in Appendix A, *infra*. The order of the Supreme Court of California denying hearing without opinion is unreported; it is reproduced in Appendix B, *infra*. The opinions of the Superior Court of the State of California for the County of Los Angeles are unreported; they are reproduced in Appendices C and D, *infra*.

JURISDICTION

The judgment of the California Court of Appeal was entered July 18, 1983 and modified August 1, 1983. A timely petition for rehearing was denied by that court on

August 11, 1983. The Supreme Court of California denied a timely petition for hearing on October 6, 1983. Notice of appeal to this Court was filed in the Court of Appeal on November 28, 1983. See Appendix E, *infra*. This Court has jurisdiction under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

California Civil Code § 48a provides in relevant part:

> "Libel in newspaper; slander by radio broadcast
>
> "1. Special damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. . . .
>
> "2. . . . no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast. . . .
>
> "4. . . . (d) 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff. . . ."

California Civil Code § 3294 and other pertinent constitutional and statutory provisions are reproduced in full at Appendix F, p. 67a, *infra*.

RAISING THE FEDERAL QUESTION

As it had in the trial court, Appellant argued in the Court of Appeal that if construed to exclude Appellant from its protection, California Civil Code § 48a "would be an arbitrary and irrational distinction, based apparently on media content, which would violate the First and Fourteenth Amendments of the United States Constitution," and "lead to the unconstitutionality of the provision in question." Appellant also contended that applica-

tion of California's general punitive-damage statute, California Civil Code § 3294, to Appellant in this case would violate the First, Eighth and Fourteenth Amendments to the United States Constitution. The Court of Appeal rejected those arguments and held both that § 48a could be applied to exclude Appellant and that Civil Code § 3294's provision for punitive damages based simply on "conscious disregard" of the rights of others was constitutional as applied to Appellant. Pp. 14a, 20a-21a, *infra*. Appellant renewed the same arguments to the Supreme Court of California, which denied review. Because the constitutionality of the statutes as applied was drawn into question, and the decision below upheld their validity, this Court has jurisdiction on appeal under 28 U.S.C. § 1257(2). See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979). *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921).[1]

STATEMENT

This is an action for libel brought by the actress Carol Burnett against the National Enquirer, Inc., publisher of the weekly tabloid *National Enquirer*. The alleged libel consisted of a four-sentence news item in the *Enquirer*'s March 2, 1976 gossip column, headlined "Carol Burnett and Henry K. in Row," and reading in its entirety:

> "At a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of wine over one diner—and started giggling instead of apologizing. The guy wasn't amused and 'accidentally' spilled a glass of water over Carol's dress."

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[1] If for any reason this Court were to conclude that appellate jurisdiction under 28 U.S.C. § 1257(2) were lacking, we respectfully request that this jurisdictional statement be treated pursuant to 28 U.S.C. § 2103 as a petition for certiorari under 28 U.S.C. § 1257(3). Title 28 U.S.C. § 2403(b) may be applicable.

Ms. Burnett's attorney demanded a retraction of that news item "in the manner provided for in Section 48(a) [*sic*] of the Civil Code of the State of California." Appellant agreed to retract in accordance with that statute, and accordingly on April 6, 1976, it published the following retraction and apology, in bold-face type, again in the gossip column:

> "An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett."

Notwithstanding the retraction, Ms. Burnett sued for libel, demanding $5,000,000 compensatory damages, and in addition $5,000,000 punitive damages. The complaint alleged that Appellant published "a weekly newsaper of national circulation" and that Appellee had demanded, but not adquately received, a retraction "pursuant to California Civil Code § 48(a) [*sic*]."

California Civil Code § 48a sets two separate limitations on damages that can be imposed for a libel published "in a newspaper" or by radio:[2] First, if an adequate retraction is timely made, a plaintiff can recover only special damages (*e.g.*, for out-of-pocket losses), but no general damages (*e.g.*, for hurt feelings), and no punitive damages. Second, in every case—even if no retraction is made—the statute prohibits punitive (exemplary) damages except on proof that the publisher acted with "that state of mind arising from hatred or ill will toward the plaintiff."

For four years after filing the complaint, Appellee's attorney continued repeatedly to allege that this case was controlled by § 48a. The trial court indeed initially held that the "hatred or ill will" required under § 48a could

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[2] Television broadcasts are covered by § 48a by virtue of California Civil Code § 48.5.

not be shown, so that therefore § 48a precluded punitive damages in this case. But thereupon Appellee's attorney moved to overturn his own repeated prior allegations that § 48a applied. He changed his position because, he frankly explained,

> "it occurred to your declarant that if the National Enquirer were not a newspaper, . . . the definition of actual malice [requiring proof of hatred or ill will] as contained in § 48(a) of the Civil Code would not apply."

The trial court at first rejected that new argument, again holding:

> "the National Enquirer, Inc. is a newspaper within the meaning of newspaper as said term is contained in Civil Code § 48a."

However, six months later on Appellee's renewed motion the trial court revised its position and held that whether § 48a applied was "a triable issue of fact."

At trial the court excluded the jury and announced, "we are here to decide whether or not the publication is a newspaper or magazine." It then heard testimony on this point from two journalism professors, the *Enquirer*'s head of story control, and the *Enquirer*'s editor.[3] The

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[3] One professor was the Chairman of the Journalism Department at the State University of California at Long Beach, and also the President of the Los Angeles chapter of Sigma Delta Chi journalism fraternity. He testified that based on his five years' experience as a practicing reporter and twenty-two years as a journalism professor, and his "talking with professionals in the newspaper business," the *Enquirer* is what is customarily called a "tabloid newspaper." The other witness, a retired journalism professor presented by Appellee, testified that he had never read the *Enquirer* before being retained by Appellee, but that based on his research of dictionary definitions, his layman's reading of court decisions, and his reviewing the apparent timeliness of only *one* article, he thought the *Enquirer* should not be treated as a newspaper. He added that:

> "I think that deadline thing is not as crucial as the actual content of the publication. . . . The determining factor, to me, was what is referred to as 'news while it's news,' the hot

head of story control testified without contradiction that the *Enquirer* has an average of twenty-five to thirty "hot potato" news items each week, and that late-breaking news items sometimes are prepared the same morning the paper goes to press. The editor supplied examples of rush stories, and listed numerous governmental authorities and trade groups that classify the *Enquirer* as a newspaper.[4]

The trial court at the conclusion of the hearing announced that

> "there probably isn't anything spelled out in terms of standards how to weigh these things. There isn't anything spelled out in the statute. Unfortunately, the cases don't spell it out." Pp. 44a-45a, *infra*.

The trial court then said that it had concluded that the test under § 48a was whether "timely news predominates." "That to me," said the court, "is the critical thing in de-

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news concept that the Supreme Court expressed when it extended the New York Times protection to public figures. The Supreme Court sought to protect hot news."

[4] The *Enquirer* on its front page for years has claimed the "Largest Circulation of Any *Paper* in America." (Emphasis supplied). The editor testified without contradiction that the *Enquirer* has been granted membership in the American Newspaper Publishers Association; it subscribes to the Reuters News Service; its staff call themselves "newspaper reporters;" it describes its business as "newspaper" in its filing with the Los Angeles County Assessor and in its insurance applications; the Nebraska revenue department has ruled that "the National Enquirer meets the qualifications of a newspaper and is thus exempt from sales and use tax;" and the United States Department of Labor describes the *Enquirer* as "belonging to establishments primarly engaged in publishing or printing and publishing newspapers." It was also uncontradicted that the *Enquirer* is printed on newsprint in tabloid format, is not stapled, and is of a size, format and layout indistinguishable from such tabloid dailies as the New York *Daily News* and Chicago *Sun-Times*, while altogether different in format from such magazines as, *e.g.*, *Time* or *Newsweek*. A grouping of the *Enquirer* in 1960 with national magazines was based solely on advertising marketing; moreover, there was uncontradicted evidence that the *Enquirer* had drastically changed its content and become far more active in newsgathering since 1960.

ciding whether this is a newspaper or a magazine." P. 45a, *infra*. After examining four issues of the *Enquirer* (that did *not* include the issue in question), the court held that although "I'm not saying the paper [*sic*] is totally devoid of it," *ibid.*, nevertheless in the court's view "timely news" did not "predominate," *ibid.*, so that "at least for what it is worth I am ruling that the Enquirer is a magazine for purposes of not giving them the benefit of Civil Code Section 48(a) [*sic*]." P. 51a, *infra*.

At trial before a jury the editor of the *Enquirer* testified that the retraction had been published simply to comply with Appellee's demand under § 48a and based on her assurance that the news item had not been correct.[5] Her counsel specifically conceded on the record that there had been no measurable damage to her reputation and that "the only economic loss that she sustained was $250 to her attorneys in endeavoring to get a retraction." Her counsel added that

> "the only damages we are talking about in this case, the only relevant damages, are general damages for emotional distress."

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[5] The evidence at trial showed that Appellant's writers and editors had had at least one reliable source for every element of the four-line news item (except the characterization of a loud discussion with Mr. Kissinger as a "row"), that some parts had two sources, and that none had been contradicted by anyone prior to publication. Appellee, concededly a public figure, admitted that she had in fact been in the restaurant, by her own recollection had drunk "two, possibly three" glasses of wine, had then shared her dessert with other diners who were strangers, and had had an animated conversation with Henry Kissinger, which some characterized as loud. She testified that although she objected to the word "boisterous" in the news item, "effervesent" would have been an accurate description of her behavior that evening and would have satisfied her. She also testified that she had portrayed drunks "numerous times" in order "to make people laugh" because "It's comedy."

The court instructed the jury, because it held Civil Code § 48a was inapplicable, that if liability were found,[6] general compensatory damages could be awarded in whatever amount the jury thought "just and reasonable." The court also instructed that in addition a punitive award could be imposed "in your discretion." It rejected Appellant's contention that punitive damages required showing of hatred or ill will and therefore could not be awarded in the face of Appellee's counsel's concession that

> "I'm not . . . saying that these people [Appellant] . . . have any actually [*sic*] ill will."

Because of its holding that Civil Code § 48a's protections for a "newspaper" did not apply, the court instructed that once liability was established, for a punitive award all that had to be shown—and by merely a preponderance of the evidence—was that Appellant had acted with "conscious disregard for the rights of others." The court added that "the law provides no fixed standards as to the amount of such punitive damages."

The jury set compensatory damages at $300,000, and in addition imposed punitive damages of $1,300,000 (one-half of Appellant's net worth). The trial court—holding that "the record is clear that she suffered no actual pecuniary loss as a result of the libelous article," p. 58a, *infra*—reduced the compensatory damage award to $50,000. With regard to punitive damages, the court said that Appellant habitually engaged in a "style of journalism" that the court characterized as "legalized pandering designed to appeal to the readers' morbid sense of curiosity," p. 60a, *infra*, and on that basis the court approved punishment of $750,000.

On appeal, the California Court of Appeal approved all the reasoning and instructions of the trial court. The Court of Appeal conceded that "no definitive exposition of the scope of § 48a has been articulated sufficiently for

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[6] The liability standard was clear and convincing proof of knowing or reckless disregard for truth or falsity. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

us to say the question of its application here is without doubt." P. 13a, *infra*. It acknowledged that heretofore California had applied the protection of § 48a to the *Saturday Evening Post*, to the *Reader's Digest*, to editorials, and to "columnists, critics, editors." P. 9a, *infra*. The Court of Appeal did not comment at all on one of its own prior decisions, called to its attention by Appellant, in which it had itself held without hesitation that § 48a applies to the *National Enquirer*.[7] Nevertheless, in spite of those other applications, the court said, § 48a applied "as the trial court supposed" only to periodicals whose stories upon review by a court showed "constraints of time," and that "the trial court consistently with the foregoing rationale correctly determined the National Enquirer should not be deemed a newspaper for the purposes of the instant litigation." P. 14a, *infra*.

The court never addressed Appellant's argument that if applied to exclude Appellant, California Civil Code § 48a would violate the guarantees of equal treatment contained in the First and Fourteenth Amendments. And rejecting Appellant's challenge to imposition of punishment for its "style of journalism" based simply on finding "conscious disregard for the rights of others" by a preponderance of the evidence, the court held that this was the standard for punishment set by California Civil Code § 3294, the ordinary punitive-damage statute, and that that statute as applied to Appellant was constitutional. The court commented:

> "While a review of the decisions of that court [the Supreme Court of the United States] on the subject reveals a wide spectrum of opinion concerning the propriety of punitive damages in instances like the

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[7] *Faan* v. *National Enquirer, Inc.*, 78 Cal. App. 3d 543, 144 Cal. Rptr. 496 (1978), reprinted at p. 73a, *infra*. A petition for review of the *Faan* case was denied by the California Supreme Court, but that court held that the court of appeal's opinion in that case did not qualify to be published in the permanent volume of reports. Such publication is reserved for only an opinion that "establishes a new rule of law," criticizes an existing rule, or "involves a legal issue of continuing public interest." California Rule of Court 976.

one before us, we do not find in any of these authorities an announcement of definitive principles which a state must apply to awards of such damages when, as here, the *New York Times* test has been satisfied." P. 27a n.12, *infra*.

The court said it presumed from the excessiveness of the award that the jury had been motivated by "passion or prejudice" against Appellant, p. 24a, *infra*, but nevertheless affirmed the judgments of liability and $50,000 compensatory damages. It offered Appellee a choice between reduction of the penalty amount to $150,000, or a partial new trial limited to punitive damages. Appellee elected the latter. The Supreme Court of California denied review.

THE QUESTIONS ARE SUBSTANTIAL

By holding that the retraction statute's protection is to depend on a court's impression of a tabloid's content, and also by holding that a public figure can recover punitive damages when the publisher had no ill will (the absence of which Appellee conceded), the decision below conflicts with holdings of at least five state courts and two federal courts of appeals, and violates the First and Fourteenth Amendments. Retraction statutes similar to California's exist in more than thirty states. A number of them, like California's, describe their coverage of the written press by simply referring to "newspapers." [8] Until now, no state had attempted to define "newspaper" in terms of news content,[9] and decisions in parallel contexts have held that to make a periodical's legal status turn on judicial impressions of its content would violate the First and Fourteenth Amendments. *E.g.*, *Hadwen, Inc.* v. *Department of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980),

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[8] *E.g.*, IDAHO CODE § 6-712; IND. CODE § 34-4-15-1; IOWA CODE § 659.2; KY. REV. STAT. § 411.051; MINN. STAT. § 548.06; MISS. CODE § 95-1-5; NEV. REV. STAT. § 41.336; N. DAK. CENT. CODE § 14-02-08; S. DAK. COD. LAWS § 20-11-7; UTAH CODE § 45-2-1.

[9] Minnesota, for example, has interpreted "newspaper" in its retraction statute (on which California's was modeled) to include a mimeographed circular that appeared no more than eight times per year. *Soderberg* v. *Halver*, 276 Minn. 315, 150 N.W.2d 27 (1967).

appeal dismissed, 451 U.S. 977 (1981). In addition, the court's order that there be a new civil trial for no purpose except to set punishment for the *Enquirer* violates the same constitutional guarantees, because it was conceded that Appellant did not publish with any ill will, and that Appellee, a public figure, suffered no measurable harm to reputation at all.

I. BY CAPRICIOUSLY PROTECTING SOME WEEKLY PERIODICALS BUT NOT OTHERS, DEPENDING ON THEIR CONTENT, THE DECISION CONFLICTS WITH DECISIONS OF TWO STATE SUPREME COURTS, OF TWO FEDERAL COURTS OF APPEALS, AND OF THIS COURT.

A. The Statute Is Applied Arbitrarily and Without Standards.

The trial court held a hearing "to decide whether or not the publication is a newspaper or magazine." The court candidly conceded that

> "there probably isn't anything spelled out in terms of standards how to weigh these things. There isn't anything spelled out in the statute. Unfortunately, the cases don't spell it out." Pp. 44a-45a, *infra*.

That was understatement. "Arbitrary and capricious" is an epithet so often invoked in legal pleadings that by overuse it has almost lost its meaning. But "arbitrary and capricious" is the only phrase to describe California's shifting, inconsistent and standardless applications of its Civil Code § 48a.

The trial court concluded, and the Court of Appeal agreed, that the *National Enquirer* is outside the substantial protections that § 48a provides "in any action for damages for the publication of a libel in a newspaper." Yet that holding is impossible to square with previous applications of § 48a, which have held that "newspaper" in § 48a includes the *Saturday Evening Post* [10] and even the monthly *Reader's Digest*,[11] and that

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[10] *Harris* v. *Curtis Pub. Co.*, 49 Cal. App. 2d 340, 121 P.2d 761 (1942).

[11] *Briscoe* v. *Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34 (1971).

it applies to "columnists, authors, critics" [12] as well as editorials,[13] and to magazines and perhaps even books.[14] California unhesitatingly applies § 48a's protection to other weekly newspapers, at least those published in the State of California.[15] In California the application of § 48a goes back and forth from case to case, without any objective reference point. The California holdings array themselves in the following incomprehensible jumble:

Newspaper	Not a Newspaper
Saturday Evening Post	*National Enquirer* (in this case)
Reader's Digest	*TV Guide* [16]
Friday Observer (weekly)	
B'nai B'rith Messenger (weekly)	
Magazines and possibly textbooks	

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[12] *Pridonoff* v. *Balokovich*, 36 Cal. 2d 788, 791, 228 P.2d 6, 8 (1951).

[13] *Kapellas* v. *Kofman*, 1 Cal. 3d 20, 459 P.2d 912 (1969); *Maidman* v. *Jewish Publications, Inc.*, 54 Cal. 2d 643, 355 P.2d 265 (1960).

[14] *Johnson* v. *Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974) (dictum).

[15] *E.g.*, *Maidman* v. *Jewish Publications, Inc.*, *supra* (weekly *B'nai B'rith Messenger*). Thus last year in *Gomes* v. *Fried*, 136 Cal. App. 3d 924, 186 Cal. Rptr. 605 (1982), it was held that the protection of § 48a extended to a publication called the *Friday Observer*, which was published once per week in San Leandro, California. Appellee's own expert testified regarding the *Enquirer* that

> "Well, being a weekly *newspaper* [*sic*—his word], it wouldn't be like a newspaper that tries to get 'today' in the first paragraph of every story."

When asked about local California small-town weeklies, he explained:

> "Well, 48(a) protects California newspapers. They are not national exposure. They are not national newspapers."

There are over 400 weekly newspapers published in California.

[16] *Montandon* v. *Triangle Publications, Inc.*, 45 Cal. App. 3d 398, 120 Cal. Rptr. 186, *cert. denied*, 423 U.S. 893 (1975) (*TV Guide*, the court noted, describes itself as a "magazine;" see p. 49a, *infra*).

California has not even applied § 48a consistently to the *National Enquirer* itself. Five years ago in *Faan* v. *National Enquirer, Inc.*, 78 Cal. App. 3d 543, 144 Cal. Reptr. 496 (1978), p. 73a, *infra*, the same California court of appeal held that § 48a applied and indeed was "the statute which is determinative," p. 77a, *infra*, in dismissing a suit against the *National Enquirer*.[17] Then came the present case, which held that the *Enquirer* should not be treated as a "newspaper" after all. And then, less than a month ago, the same California court of appeal in yet another opinion, not involving § 48a, acknowledged that "The Enquirer publishes *a weekly newspaper known as the 'National Enquirer.'*" *Eastwood* v. *Superior Court*, —— Cal. App. 3d —— (Ct. App., 2d Dist., No. 67746, Dec. 1, 1983) (emphasis supplied).[18]

The point is, California as shown by its totally inconsistent pattern of inclusion in and exclusion from § 48a has been following not law, but whimsy. If the California statute were a regulation being applied so capriciously by administrators, there is no doubt that it would violate constitutional requirements of certainty and equal protection. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886);[19] see also *Kunz* v. *New York*, 340 U.S. 290, 293-

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[17] See note 7, *supra*.

[18] In other contexts, the Supreme Court of California has also held that even an information sheet prepared and circulated by inmates of a state prison is a "newspaper." *Bailey* v. *Loggins*, 32 Cal. 3d 907, 654 P.2d 758 (1982). So also, California has held, is a political tract distributed weekly. *Long* v. *City of Anaheim*, 255 Cal. App. 2d 191, 63 Cal. Rptr. 56 (1967). So is a give-away paper subsisting on advertisements. *Laguna Pub. Co.* v. *Golden Rain Foundation*, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), *appeal dismissed*, 103 S. Ct. 1170 (1983).

[19] "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886).

94 (1951); *Saia* v. *New York*, 334 U.S. 558, 560 (1948). That it is instead being capriciously applied by California courts does not alter its unconstitutionality as applied, under the First Amendment as well as the Fourteenth. *Police Dept.* v. *Mosley*, 408 U.S. 92, 98 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967); *cf.* also *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964); *Smith* v. *Cahoon*, 283 U.S. 553 (1931).

B. The Statute Unconstitutionally Distinguishes Among Publications Based Upon Their Content.

To the extent that they articulated any rationale at all, both courts below made the applicability of § 48a turn, not on the physical qualities of the tabloid, or any other objective test, but rather upon the courts' subjective impressions of the newsworthiness of its content. As the trial court explained,

> "I mean, I don't have any problem distinguishing the New York Daily News from the National Enquirer.
>
> "Sure, they are both in tabloid forms, but that goes to form and not substance.
>
> "And that's what counts." P. 47a, *infra*.

The trial court held that the *Enquirer* did not qualify as a "newspaper" because based upon *the court's* reading of four issues (*not even including* the one in which the news item complained of appeared), "the timely news" did not appear to "predominate," and "[t]hat to me is the critical thing in deciding whether this is a newspaper or a magazine." P. 45a, *infra*.[20] The Court of Appeal, endorsing the trial court's impression of the timeliness of the *Enquirer*'s content, agreed that § 48a applied only where it appeared from the way the stories were written

[20] If the apparent timeliness of content were a legitimate test, then a publication's legal status could vary from issue to issue. And then there would be a simple due process violation here, because the trial court never read the issue in which the news item appeared, but instead examined *four other* issues of the *Enquirer*.

that "the constraints of time as a function of the requirements associated with production dictate the result," and that "the trial court consistently with the foregoing correctly determined the National Enquirer should not be deemed a newspaper." P. 14a, *infra*.

In upholding a statute construed to define "newspaper" based on content and on what to a judge appears to be "timely news," the decision below is in flat conflict not only with this Court's holdings, but with a decision of the Supreme Court of Vermont that recently held just the opposite. In *Hadwen, Inc.* v. *Department of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed*, 451 U.S. 977 (1981), the Vermont court was asked to rule on whether a giveaway advertising weekly qualified as a "newspaper" for purposes of Vermont's use tax exemption. Referring to the First Amendment and to the need to "avoid a construction which may lead to the unconstitutionality of the provision in question," the Vermont Supreme Court explained:

> "Therefore, *we decline to adopt a definition of 'newspaper' publications based upon their content . . . .*" 139 Vt. at 39, 422 A.2d at 257 (emphasis supplied).

In so holding, the court relied on this Court's decisions in *Police Dept.* v. *Mosley*, 408 U.S. 92, 95 (1972), and *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 215 (1975).

The same issue arose last year in Massachusetts, again in the context of applying the exemption for a "newspaper" in a tax statute to a weekly tabloid consisting 85% of advertisements. The highest court of Massachusetts noted that

> "The Town Crier contains a large amount of advertising, but whether it is a newspaper cannot depend on the ratio of advertising to other matters." *Greenfield Town Crier, Inc.* v. *Commissioner*, 385 Mass. 692, 696, 433 N.E.2d 898, 901 (1982).

The Massachusetts court referred to the First Amendment and said that on that point it adopted the reasoning of the Vermont court in *Hadwen, supra. Ibid.*[21]

California's content-based approach to meting out protection, based on a court's perception of "timely news," also is in conflict with decisions of at least two United States Courts of Appeals. In *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974), *vacated on other grounds*, 420 U.S. 371 (1975), the Third Circuit sitting *en banc* held that

> "The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news." 491 F.2d at 223.

The same court reiterated that rule just last year in *Ad World, Inc.* v. *Township of Doylestown*, 672 F.2d 1136 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982), holding that a sixteen-page weekly tabloid consisting mainly of advertising was a "newspaper" and as such was constitutionally entitled to be exempt from a local ordinance restricting distribution of advertising materials. And just last month the Second Circuit, in construing the "fair use" provisions of the Copyright Act to accord with constitutional "values of free expression," explicitly rejected the approach taken by the California courts here:

> "The trial court characterized its task as deciding 'whether the Nation's article was "news reporting" . . . .'
>
> "[A] careful reading of the opinion reveals that the district judge decided the piece was not news reporting because it contained insufficient 'hot news' to be

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[21] Similarly, in *Sears, Roebuck & Co.* v. *State Tax Comm'n*, 370 Mass. 127, 345 N.E.2d 893 (1976), the Supreme Judicial Court of Massachusetts held that a tax exemption for "newspapers" should be construed to include even advertising inserts prepared by Sears, Roebuck & Co., in part because of the "effect on First Amendment freedoms." 370 Mass. at 131, 345 N.E.2d at 896. Although both *Hadwen* and *Greenfield Town Crier* were cited to the court below, its opinion made no reference to them.

so classified. The court, in short, substituted its own views concerning the quality of the journalism in *The Nation* article, and then determined that it was not news because it was not good or genuine news. . . .

"We fully agree with our brother Meskill that courts should be 'chary' of deciding what is and what is not news." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, Nos. 83-7277, 83-7327, U.S. Court of Appeals, 2d Cir. (Nov. 17, 1983), slip op. at 193-194.[22]

The Vermont, Massachusetts and Second and Third Circuit interpretation of the Constitution is correct, and the California view is wrong. As this Court has held, "above all else, the First Amendment means that government

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[22] The California courts' *a priori* definition of "newspaper" based on what a court considers timely news has never been the judicial understanding of "newspaper." For example, in *Friedman's Express, Inc.* v. *Mirror Transp. Co.*, 71 F. Supp. 991 (D.N.J. 1947), *aff'd*, 169 F.2d 504 (3d Cir. 1948), construing the definition of "newspaper" in the federal Motor Carrier Act, the court reminded:

> "The proportion of news items to advertisements and special features varies with different papers; and in the Sunday issues of Metropolitan journals which are imposing in bulk, if not always in contents, the proportion of news to the rest of the printed and pictured matter is but small. News of world-shattering import will be conveyed to readers in far less space than is occupied in calling attention to contraptions for shapely confinement of the female figure, or for perfumes guaranteed to slay the most recalcitrant misogynist, or for conveying the reminder that even your best friends won't tell you. Reports of discussions at the United Nations Organization or Ecclesiastical synods yield in amount of line-space to paid recital of the ultimate in boudoir furnishings or kitchen equipment. The greater part of the matter furnished for the edification of the Sunday newspaper reader is concerned with salesmanship, fiction and mental titillators rather than the exposition of news."

As Judge Learned Hand observed, "That paper may print it verbatim, or a summary of it, or a part of it. The last two are certainly as authentically new and original as the dispatch itself . . . ." *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept.* v. *Mosley*, 408 U.S. 92, 95 (1972). Any regulation based on a newspaper's "selection of news stories," this Court has held, "would be incompatible with the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n*, 413 U.S. 376, 385 (1973). Yet here the statute improperly "exact[ed] a penalty on the basis of the content of a newspaper." *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974); see also *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).

The Chief Justice recognized and warned about the danger of picking and choosing among publications in *First National Bank* v. *Bellotti*, 435 U.S. 765, 801 (1978) (concurring opinion):

> "The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country."

The same had been earlier recognized in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), where this Court unanimously struck down a tax that had been enacted "with the plain purpose of penalizing the publishers and curtailing the circulation of *a selected group of newspapers.*" 297 U.S. at 251 (emphasis supplied). In *Winters* v. *New York*, 333 U.S. 507, 510 (1948), this Court recognized that "[t]he line between the informing and the entertaining is too elusive" to permit the legal status of publications to hinge on such distinctions. And in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), this Court rejected a proposal that courts should decide "which publications address issues of 'general or public interest'" because, it said, "We doubt the wisdom of committing this task to the conscience of judges."

Earlier this year, in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner*, 103 S.Ct. 1365 (1983), this Court reminded that a statute violates the First and Fourteenth Amendments when it "targets individual publications within the press." 103 S.Ct. at 1376. There Minnesota "has created a special tax that applies *only to certain publications* protected by the First Amendment." 103 S.Ct. at 1370 (emphasis supplied). As this Court emphatically concluded:

> "[W]e think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it *singles out a few members of the press* presents such a potential for abuse that *no interest suggested by Minnesota can justify the scheme.*" 103 U.S. at 1375 (emphasis supplied).

C. The Statute As Applied To Exclude This Weekly Tabloid Is Void for Vagueness.

It is of course well established that a newspaper has a First Amendment right to decline to publish material. *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974). No authority could have *required* the *National Enquirer* to print the retraction that it published here.

However, brandishing and invoking explicitly the provisions of § 48a, see p. 4, *supra*, Appellee's counsel demanded a retraction "in the manner provided for in Section 48(a) [*sic*] of the Civil Code of the State of California." Reasonably relying on being covered by § 48a, the *Enquirer* promptly complied and printed a retraction and apology, giving up its First Amendment right recognized in *Tornillo*.[23] It did so on the under-

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[23] Pp. 4-5, *supra*. Because the trial court held that § 48a excludes the *National Enquirer*, the adequacy of the retraction under § 48a was never put to the jury. The dicta of both courts below (pp. 25a, 56a, *infra*), complaining that the retraction was insufficiently abject, we believe simply do not bear scrutiny. A comparison of the retraction the trial court said would have been adequate, p. 64a, *infra*, with the one that was printed, p. 4, *supra*, speaks for itself, particularly when compared to the much more cursory "corrections" that appear in most newspapers nearly every day.

standing that thereby its potential liability for general and punitive damages would be eliminated. As the Supreme Court of California has explained, "the retraction provisions of section 48a provide a reasonable substitute for general damages . . . ." *Werner* v. *Southern California Associated Newspapers*, 35 Cal. 2d 121, 126, 216 P.2d 825, 828 (1950), *appeal dismissed on appellant's motion*, 340 U.S. 910 (1951).

Now California has held that, contrary to what everyone long thought,[24] the statute's protection does not extend to this tabloid at all. But a statute that by the uncertainty of its terms and application causes First Amendment rights to be lost is itself void for vagueness under both the free speech and due process guarantees incorporated in the Fourteenth Amendment.

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely . . . ." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (footnote omitted).

Accord, *NAACP* v. *Button*, 371 U.S. 415, 432-33, 438 (1963); *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Winters* v. *New York*, *supra*. A statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964); see also *Bouie* v. *City of Columbia*, *supra*. Vagueness is also particularly intolerable when punishment is at stake. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). Appellant's First Amendment rights were sacrificed here because of the vagueness of the statute. And "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations . . . ." *Tornillo*, *supra*, 418 U.S. at 256.

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[24] The trial court recognized, "apparently I've caught you by surprise." P. 49a, *infra*. As earlier noted, the trial court had twice earlier ruled in this very case that the *Enquirer* was protected by § 48a. See pp. 4-5, *supra*.

II. BY HOLDING THAT THE FIRST AMENDMENT PERMITS PUNITIVE DAMAGES FOR A PUBLIC FIGURE IN A LIBEL CASE—WHEN HATRED, ILL WILL AND DAMAGE TO REPUTATION ALL WERE ABSENT—THE DECISION CONFLICTS WITH HOLDINGS OF THREE STATE COURTS AND WITH THE CLEAR IMPLICATION OF DECISIONS OF THIS COURT.

Whether punitive damages, with their vast latitude for punishing unpopular opinion, are tolerable under the First and Fourteenth Amendments in a libel case brought by a public figure is an issue left unsettled by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The American Law Institute recognizes that "[a]n authoritative determination . . . awaits further action by the Court." RESTATEMENT (2D), TORTS, § 621, comment *d* (1977). Also totally unsettled, if punitive damages are in some instances to be permitted, is the question of what constitutional standards govern their application in suits by public figures. For here it is undisputed that there was no hatred or ill will by the publisher. As Appellee's counsel stated at trial,

> "I'm not . . . saying that these people [Appellant] . . . have any actually [*sic*] ill will."

No damage to reputation was claimed, either. Appellee's counsel stated: "the only damages we are talking about in this case, the only relevant damages, are general damages for emotional distress." But he added: "the first two items [special and general damages] have to do with Carol's case, what she's lost. *The second part* [punitive damages] *is really against the National Enquirer.*" (Emphasis supplied.)

A. The State Courts Are in Conflict.

In square conflict with the decision below, three states have held that the First and Fourteenth Amendments bar punitive damages in libel actions for public figures

who recover adequate compensatory damages.[25] In *Sprouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W .Va.), *cert. denied*, 423 U.S. 882 (1975), the Supreme Court of West Virginia in disallowing punitive damages did so because they "would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which has been the object and purpose of the United States Supreme Court to prevent since New York Times v. Sullivan, *supra*." 211 S.E.2d at 692. That court's reasoning was adopted by Louisiana in *McHale* v. *Lake Charles American Press*, 390 So.2d 556, 570 (La. App. 1080), *cert. denied*, 452 U.S. 941 (1981). The Supreme Judicial Court of Massachusetts likewise has held punitive damages barred, resting its holding on both state grounds and federal constitutional policy:

> "We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof, whether based in negligence, or reckless or wilful conduct. We so hold in recognition that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship." *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 860, 330 N.E.2d 161, 169 (1975).

Thus, as the law now stands after the decision below, public-figure libel plaintiffs in California may obtain punitive damages without even proving a publisher's ill

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[25] In addition, at least two states have held that punitive damages in libel cases are barred by the free-speech and free-press guarantees of their own constitutions. *Hall* v. *May Dept. Stores*, 292 Ore. 131, 637 P.2d 126 (1981); *Taskett* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976). Two more states have held that punitive damages for libel are barred by their constitutions unless there is proof (concededly absent here) that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

will, but in other states they are held barred by the United States Constitution from any punitive award at all. And to the extent that libel plaintiffs may have a choice of states in which to sue, *cf. Keeton* v. *Hustler Magazine, Inc.*, No. 82-485, they will be able to select those where punishment of publishers is encouraged. That is an intolerable conflict among the states on a matter of federal constitutional law. It is unfair to plaintiffs and defendants alike. Only this Court can resolve it.

B. On the Broad Instructions Approved Here, Punitive Damages Unconstitutionally Punish for Legal Expression by Unpopular Publishers.

The trial court advised the jury, in an instruction which the Court of Appeals approved, that the malice required for an award of punitive damages was simply "conduct . . . carried on by the defendant with a conscious disregard for the rights of others," and that this might be established by a simple preponderance of the evidence. The court added:

> "The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice."

We cannot state the constitutional problem raised by such instructions any better than this Court did in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974):

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views."

Anomalous as they are in other contexts, punitive damages are particularly bizarre and dangerous when applied to First Amendment conduct. The stated purpose of punitive—"exemplary"—damages is punishment and deterrence. See, *e.g.*, *City of Newport* v. *Fact Concerts, Inc.*,

453 U.S. 247, 266-67 (1981).[26] Punitive damages can indeed set an example, and that example chills others, and with them a wide swath of speech and press activities.[27] Yet the rule this Court has consistently applied under the First Amendment is that lawful speech must *not* be deterred, and that speech may be regulated only by clearly defined and evenhanded standards. See, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *NAACP* v. *Button*, 371 U.S. 415 (1963). This Court has struck down procedures that "create the danger that the legitimate utterance will be penalized." *Spieser* v. *Randall*, 357 U.S. 513, 526 (1958). Punitive damages are the only instances in which some courts routinely *endorse* the chilling of First Amendment freedoms.

The threat of unlimited punitive damages is particularly troublesome to publishers because, unlike compensatory damages, punitive awards are unpredictable in amount, and so the degree of care in preparing a story cannot be related to the potential risk. (Here, for example, the plaintiff concededly suffered no damage except alleged emotional distress, yet the punishment imposed by the jury was $1,300,000.) Punitive awards thus habitually violate the constitutionally mandated requirement of proportionality in punishment. See *Solem* v. *Helm*, 103 S.Ct. 3001 (1983). Unpredictability is heightened because in many states, including California, a publisher cannot insure against punitive damages. A single un-

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[26] There is no doubt that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.20 (1979). Punitive damages "are private fines." *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 350. In California they "are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff." *Brewer* v. *Second Baptist Church*, 32 Cal. 2d 791, 801, 197 P.2d 713, 720 (1948).

[27] Based upon economic analysis of their overbroad deterrent effect, Judge Posner has concluded that in libel cases "punitive damages should be disallowed." R. POSNER, ECONOMIC ANALYSIS OF LAW 543 (2d ed. 1977).

expected verdict may cripple a publisher.[28] At the same time, the hope of large windfalls encourages plaintiffs to file suits.

The greatest danger, of course, is that punitive damages will be used for arbitrary punishment of unpopular publishers and unpopular views. To permit such fines "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). Again, this Court has succinctly stated the problem: "it cannot be ignored that punitive damages may be employed to punish unpopular defendants." *IBEW* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979). That is exactly what happened at the trial in this case. Having been told that "The second part is really against the National Enquirer," the jury came back with a grotesque verdict of $1,300,000 punitive damages. The trial judge then filed an opinion explaining that he did not approve of the *Enquirer* either, and, although cutting the amount, that he believed that punishment was appropriate because of distaste for the *Enquirer*'s "style of journalism," which the court described as "legalized pandering designed to appeal to the readers' morbid sense of curiosity." P. 60a, *infra*. In other words, the trial court was willing to punish for "style," and for publications not even at issue in this case—conduct which the court itself described as "legalized." The fact that Appellee rejected as insufficient a punitive award of $150,000, and instead

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[28] See, for example, the $2.5 million punitive libel verdict against the Alton (Ill.) *Telegraph*. *Cf. Green* v. *Alton Telegraph Printing Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). As the *Wall Street Journal* noted,

> "First Amendment advocates often warn of the subtle intimidation of libel suits—the 'chilling effect,' as they call it. But for small newspapers, there's nothing subtle about it. As the Telegraph case shows, a costly court fight can frighten editors, discourage reporters, saddle a business with debt and even drive families apart."

Curley, *How Libel Suit Sapped The Crusading Spirit Of a Small Newspaper*, Wall Street Journal, Sept. 29, 1983, p. 1, col. 1.

chose a new trial limited to punishment, does not solve the problem, because the court below in its opinion approved every instruction and action by the trial court except the amount of punishment.

We do not argue here that there can never be punitive damages on proper instructions as an adjunct to compensatory damages in a libel case. What we do believe this Court's decisions clearly imply at a minimum is that a windfall punitive award should not be recoverable by a public figure merely on showing of "conscious disregard for the rights of others" by mere preponderance of the evidence. Instead, the requirement in most states—and the requirement that this Court in speech cases always has assumed applied [29]—is that the publisher must be shown to have acted out of *hatred or ill will* toward the plaintiff. That, this Court has recognized, is "the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." *Cantrell* v. *Forest City Pub. Co.*, 419 U.S. 245, 252 (1974); *accord*, *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 161 (1967) (plurality opinion). That is consistent with this Court's holding that publication cannot be punished except when the publisher has notice of wrongdoing. *Smith* v. *California*, 361 U.S. 147 (1959). That is also consistent with this Court's recognition in *Gertz* v. *Robert Welch, Inc.*, *supra*, that for private figures punitive damages require a greater showing of misconduct than compensatory damages. The same should be true for public figures—a greater showing of misconduct for punitive damages should be required, *i.e.*, hatred or ill will—or else the First Amendment's protection as a practical matter is eviscerated.

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[29] *Smith* v. *Wade*, 103 S.Ct. 1625 (1983), which did not require a higher degree of fault for punitive damages in interpreting a federal civil rights statute, was not a First Amendment case, and this Court explicitly recognized that its holding did not apply to First Amendment cases. See 103 S.Ct. at 1639 n.19.

The impact of the constitutional decision below is potentially staggering. If, contrary to what this Court has heretofore assumed, there need be no showing of ill will before publishers can be punished for libel of public figures, then the press can routinely expect to pay punitive damages in nearly every libel action. And assuming that the standard for public figures will apply also to public officials, then public officials will be able not just to obtain compensation, but to *punish* even those who write about them without ill will—and something very close to the law of seditious libel will have been restored, with publishers publishing "on pain of libel judgments virtually unlimited in amount." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964).

C. The Issue Is One Which Has Not Been, But Should Be, Decided By This Court.

Windfall punitive damages now are gyrating out of control, destroying all certainty and altering the very fabric of our legal system.[30] As one California Justice recently remarked,

> "I am fearful that the law of punitive damages as it has developed in this state no longer serves any public policy, or the legitimate interests of the unentitled recipients of its constantly accelerating largess." [31]

This Court too has recognized the anomalous nature of punitive damages. In *Smith* v. *Wade*, 103 S.Ct. 1625 (1983), Mr. Justice Rehnquist joined by the Chief Justice and Mr. Justice Powell in dissent reviewed the vehement

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[30] See, *e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 2 (1982) ("Punitive damages are being sought and awarded in a growing number of cases, often for substantial amounts") (footnote omitted); Curley, *supra* note 28.

[31] *Rosener* v. *Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 758, 168 Cal. Rptr. 237, 248 (1980), *appeal dismissed*, 450 U.S. 1051 (1981) (Elkington, J., concurring). See generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 279 (1983); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1253 (1976).

criticisms of what one court called a "monstrous heresy." *Fay* v. *Parker*, 53 N.H. 342, 382 (1872); see 103 S.Ct. at 1641. This Court expressed concern in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused." In *Smith* v. *Wade*, *supra*, this Court included a clear caution that "we intimate no view on any First Amendment issues [punitive damages] . . . may raise." 103 S.Ct. at 1639 n.19. But the court below ignored that warning, because it saw in this Court's holdings only "a wide spectrum of opinion concerning the propriety of punitive damages in instances like the one before us." P. 26a n.12, *infra*. Other courts, by contrast, have doubted whether punitive damages are allowable to public figures in libel cases at all.[32]

This Court never has approved punitive damages in a case like the present one. Only once has this Court upheld an award of punitive damages in a defamation case involving a public figure at all. That was in *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967), a holding that did not command any opinion of the Court. *Butts*, however, does not support the decision below, because in *Butts* it was explicity assumed that "*punitive damages require a finding of 'ill will'* . . . ." 388 U.S. at 161 (plurality opinion) (emphasis supplied). Moreover, Mr. Justice Harlan, author of the plurality opinion in *Butts*, later came to advocate close restrictions on punitive damages in defamation cases, commenting that "matters are in flux" and that in *Butts* "my earlier opinion painted with somewhat too broad a brush." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 72 n.3 (1971) (Harlan, J., dissenting). And

[32] *E.g.*, the Second Circuit in *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977): "It may be that *Gertz* . . . and its underlying concern lest punitive damages be used 'selectively to punish expressions of unpopular views' especially with 'the wholly unpredictable amounts' that can be awarded will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure." 539 F.2d at 897.

Gertz v. *Robert Welch, Inc.*, *supra*, limiting punitive damages in defamation actions by private figures, expressed deep misgivings about punitive damages in other defamation contexts as well. No decision of this Court has ever approved an award of punitive damages to a public-figure libel plaintiff where concededly hatred and ill will were absent. On the contrary, this Court has held that speech may not be punished by a statute "eliminating all mental elements from the crime." *Smith* v. *California*, *supra*, 361 U.S. at 155.

The present appeal captures in starkest form what punitive damages against a publisher really are about. The court below, by its order commanding that a new trial be held for punitive damages alone, has directed that a publisher stand trial civilly *solely* for the purpose of determining *punishment* for a publication. This Court has never approved, or even had occasion to approve, a *civil* trial of a publisher *solely* for purposes of *punishment*. Instead, it has repeatedly expressed warnings that usually speech "is . . . inappropriate for penal control." *Garrison* v. *Louisiana*, 379 U.S. 64, 70 (1964). Certainly there is no overwhelming interest of the state necessitating such a strange punitive proceeding. As this Court observed in *Gertz* v. *Robert Welch, Inc.*, *supra*, "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349.[33]

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[33] California's own policy, as reflected in its Penal Code, sets a maximum fine for criminal libel of $5,000. CAL. PENAL CODE § 249. Indeed, the court below earlier held that criminal punishment provision unconstitutional under the First and Fourteenth Amendments. *Eberle* v. *Municipal Court*, 55 Cal. App. 3d 423, 127 Cal. Rptr. 594 (1976). A trial based on affirmance of the liability finding is inappropriate also because the court below recognized that the jury had been motivated by passion or prejudice. P. 24a, *infra*. As a matter of due process, that tainted the entire verdict. *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520 (1931).

If there is to be a trial of a publisher in which the only issue is punishment, then although due process may not necessarily require all the safeguards of a criminal trial, see generally *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976); *United States* v. *Ward*, 448 U.S. 242 (1980), it certainly should include at least the requirements of clear standards and a more demanding standard of proof than mere preponderance of the evidence. *Cf. In re Winship*, 397 U.S. 358 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Here to punish speech "the State has . . . eliminated the safeguards of the criminal process." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 69-70 (1963). Its interest in totally doing so is too slight to overcome the constitutional policies of the First, Fifth, Eighth [34] and Fourteenth Amendments.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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[34] It has been recognized that unjustified awards of punitive damages may also violate the Eighth Amendment's prohibition of "excessive fines." *Toepleman* v. *United States*, 263 F.2d 697, 700 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959).

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